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No. 15-474

In the Supreme Court of the United States

ROBERT F. MCDONNELL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the FourthCircuit

BRIEF FOR MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former elected members of the Virginia General Assembly. The Virginia General Assembly dates from the establishment of the House of Burgesses at Jamestown in 1619 and is heralded as the oldest continuous law-making body in the world. Many of the nation's founding fathers served at one time as members of this body, including George Washington, Thomas Jefferson, James Madison, James Monroe, Patrick Henry, and Richard Henry Lee.

The Virginia General Assembly is a bicameral legislature consisting of a lower house, the House of Delegates, and an upper house, the Senate of Virginia. The House of Delegates is comprised of 100 members, and the Senate of Virginia is composed of 40 members. Each State Senator represents a district of approximately 205,000 people, and each State Delegate represents a district of approximately 90,000 people. The chief function of each member is to represent the interests of his or her constituent district, and propose and enact laws that promote the general welfare of all citizens of the Commonwealth.

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certifies that no counsel for a party authored this brief in whole or in part, and no person other than *amici*, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Government has consented to the filing of this brief and its blanket consent is on file with the Clerk of this Court.

The Virginia General Assembly is a "citizen legislature." Thus, when the body adjourns following its annual session members return to their districts to resume their occupations and concurrently provide constituent services.

Amici have a strong interest and stake in this case. The conviction of Governor Robert McDonnell on a uniquely broad interpretation of the federal corruption statutes blurs the line between honest political interactions with constituents and public corruption. It now appears that accepting gifts from a constituent—even in the absence of the legislator's promising or undertaking an official act—may lead to federal prosecution should the constituent request even the slightest assistance from the legislator. Likewise, members are concerned that the Government's broad construction of the corruption laws criminalizes conduct not proscribed under Virginia law. This result unnecessarily encroaches on Virginia's state sovereignty and right to self-governance, disrupting the vertical balance of power established by the United States Constitution. It is important that the Court consider *amici*'s unique perspective on these important issues.

SUMMARY OF ARGUMENT

1. Recognizing the textual vagueness of the honest-services statute and the Hobbs Act, this Court has consistently construed those statutes narrowly to reach only core fraud, bribery, and extortion. Nevertheless, the Fourth Circuit endorsed a broad construction that potentially criminalizes any action taken by a legislator on behalf of a donor or benefactor. Under the Fourth Circuit's boundless definition of "official acts," a legislator who, for instance, attends a charity function where a meal is served may violate federal law if he later arranges a meeting between the charity and a state official.

2. The Fourth Circuit's unprecedented expansion of the federal corruption laws threatens to hinder Virginia's citizen legislators from effectively representing their constituencies. The limitless theory of criminal liability endorsed by the Fourth Circuit puts at risk of federal prosecution every Virginia public official who accepts a gift or benefit and then performs an action—no matter how unremarkable—that may potentially aid a donor. If this construction of the federal corruption statutes is allowed to stand, Virginia's legislators will have little choice but to scale back important interactions with constituents, especially interactions with donors. Such a result is anathema to a democratic society where public officials must connect and interface with their constituents to represent their interests effectively.

3. The Fourth Circuit's capacious construction of the federal corruption statutes upsets the balance of power between state and federal governments enshrined in the Tenth Amendment. The ability to

establish standards defining the legal duties and obligations of its public officials is at the very core of Virginia's authority as a coequal sovereign. Countenancing the federal government's expansive use of the corruption statutes to usurp a core power reserved to the Commonwealth of Virginia is contrary to the very structure of government created by the Constitution.

ARGUMENT

I. THE FOURTH CIRCUIT'S UNRESTRAINED DEFINITION OF "OFFICIAL ACT" IS CONTRARY TO THIS COURT'S NARROW CONSTRUCTION OF THE FEDERAL CORRUPTION LAWS.

This Court has narrowed the scope of the honest-services fraud statute and the Hobbs Act[2] to prohibit only the direct exchange of "official acts" for payment. *Evans v. United States*, 504 U.S. 255, 268 (1992). In other words, core bribery as historically understood. *See Skilling v. United States*, 561 U.S. 358, 409 (2010) (holding that honest-services fraud "criminalizes *only* the bribe-and-kickback *core* of the pre-*McNally* case law") (second emphasis added)); *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404–05 (1999) ("Bribery requires intent 'to influence' an official act or 'to be influenced' in an official act ., there must be a *quid pro quo*—a specific intent to give or receive

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[2] *See* 18 U.S.C. § 1346 (honest-services wire fraud) (prohibiting "scheme or artifice to defraud," defined to include "a scheme or artifice to deprive another of the intangible right of honest services"); 18 U.S.C. § 1951(b)(2) (Hobbs Act) (prohibiting "extortion" through "obtaining of property from another, with his consent under color of official right").

something of value *in exchange* for an official act.") (emphasis in original).

To ensure that the federal corruption laws criminalize only that "bribe-and-kickback core," *Skilling*, 561 U.S. at 409, this Court has rejected an all-actions-are-official interpretation of "official acts." *Sun-Diamond Growers*, 526 U.S. at 407 *Sun-Diamond* explained that performing political actions like hosting guests at an official function or event—"while assuredly 'official acts' in some sense—are not 'official acts' within the meaning of the" federal corruption statutes. *Id.* Imposing clear limitations on the definition of "official acts" prevents the "absurdit[y]" of criminalizing an official's constituent-service conduct that is not an exercise of actual government power, for example: "token gifts to the President based on his official position and not linked to any identifiable act—such as the replica jerseys given by championship sports teams each year during ceremonial White House visits"; "a high school principal's gift of a school baseball cap to the Secretary of Education, by reason of his office, on the occasion of the latter's visit to the school"; and "providing a complimentary lunch for the Secretary of Agriculture in conjunction with his speech to the farmers concerning various matters of USDA policy." *Id.*

The Fourth Circuit's construction effectively eliminates *Sun-Diamond*'s distinction between routine political acts and "official acts." The panel reasoned that *Sun-Diamond*'s "point was that job functions of a strictly ceremonial or educational nature will rarely, if ever" constitute "official acts" because "strictly ceremonial or educational" functions do not "have the

purpose or effect of exerting some influence on policies." *United States v. McDonnell*, 792 F.3d 478, 508 (4th Cir. 2015). Applying this reasoning, the Fourth Circuit held that "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue," *id.* at 517, are "official acts"—even without exercising, or pressuring others to exercise, any governmental power.

The Fourth Circuit's distinction between strictly ceremonial or educational functions and other acts, however, does nothing to inform representatives and their constituents of where the line between lawful politics and criminal corruption lies. Taking a *Sun-Diamond* example and applying the Fourth Circuit's reasoning proves the point. The Agriculture Secretary—who "*always* [has] before him, or [has] in prospect, matters that affect farmers," *Sun-Diamond*, 526 U.S. at 407—falls on the right side of the politics/corruption divide if he accepts a free lunch before speaking with farmers about USDA policy, and the speech is "strictly educational," *McDonnell*, 792 F.3d at 508. But, if after his speech the Agriculture Secretary takes questions that "have the purpose or effect of exerting some influence on [USDA] policies" *or* gives answers that have that same "purpose or effect," the speech becomes an "official act."

Indeed, the Fourth Circuit's understanding of "official acts" makes criminal virtually any act taken by a public official to assist a benefactor or donor. This view provides Virginia's representatives and constituents no clear boundary separating healthy political discourse from public corruption. It appears,

building on the *Sun-Diamond* example, that the panel attempted to draw the distinction based entirely on the "purpose or effect" of a representative's *or* constituent's post-speech question or answer. Essentially, the Fourth Circuit embraced a standard under which a public official can be prosecuted for public corruption because of the donor's subjective intent to influence government action. It is even unclear whether the public official must have knowledge of the *donor's* intent.

The Fourth Circuit's ruling is also entirely inconsistent with the historical understanding of honest-services fraud and provides no clear standard on which public officials can base their conduct. *See Evans*, 504 U.S. at 268. In fact, it provides no standard at all; hence, legislators are left with no reasonable degree of certainty as to whether a particular act they perform on behalf of a constituent donor violates federal law. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

Sun-Diamond made plain that not all actions deemed "official" in some sense are "official acts" within the meaning of the corruption laws. 526 U.S. at 407; *see also United States v. Jefferson*, 674 F.3d 332, 356 (4th Cir 2012) ("[T]he bribery statute[s] do[] not encompass every action taken in one's official capacity."). Consistent with *Sun-Diamond*, lower courts have concluded that a representatives' conduct is an "official act" only when it involves the exercise of actual governmental power. *United States v Valdes*, 437 F.3d 1276, 1279 (D.C. Cir. 2006), *aff'd on reh'g en banc*, 475

F.3d 1319 (D.C. Cir. 2007) (explaining that "official act" involves "a decision or action directly related to an adjudication, a license issuance (or withdrawal or modification), an investigation, a procurement, or a policy adoption."). Such a construction sufficiently separates legitimate political activity from public corruption. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 360 (2010) ("Ingratiation and access are not corruption.") The Fourth Circuit's failure to make that critical distinction warrants reversal.

II. THE GOVERNMENT'S EXPANSIVE READING OF THE CORRUPTION STATUTES THREATENS LEGITIMATE POLITICAL ACTIVITY.

The limitless theory of criminal liability advocated by the Government and endorsed by the Fourth Circuit puts at risk of federal criminal prosecution every Virginia public official who accepts a gift and performs any action that may impart some benefit to the donor. If this construction of the federal corruption statutes endures, Virginia's legislators will be forced to scale back constituent services and other socially beneficial efforts, such as collaborating with local business leaders to encourage business development in their districts and providing support to charitable organizations.

General Assembly members frequently receive meals or other benefits from constituents, and thereafter take actions that may further the pecuniary

or nonpecuniary interests of those same donors.[3] This is entirely proper in a democratic society. *See Citizens United*, 558 U.S. at 359 ("It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors.").

For instance, a typical senator or delegate attends many public events every year at which a civic club or organization provides breakfast or lunch without cost. Likewise, a business supporting a charitable cause may invite a member of the General Assembly to attend a major fund-raising event and sit at a featured table as its guest. In both situations, the General Assembly member may later have to consider a legislative matter that could either help or harm the entity that provided the benefit.

For nearly 400 years in Virginia, no one ever suggested that these or similarly innocuous actions might constitute a criminal offense. But the capacious legal standard applied by the Fourth Circuit does just that. For instance, under the Fourth Circuit's

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[3] At the time of the alleged offense conduct at issue here, Virginia law prohibited legislators from accepting gifts in certain circumstances, but violations of those laws were expressly not "subject to criminal law penalties." Va. Code § 2.2-3103(8)-(9). Neither were members of the General Assembly prohibited under state law from accepting honoraria for appearances or speeches in which they provided expertise or opinions "related to the performance of [their] official duties." Va. Code § 2.2-3103(7) (limiting prohibition on accepting honoraria to executive branch officials).

construction a legislator who receives a constituent's gift of lunch or dinner could be in jeopardy of federal criminal prosecution for assisting the constituent by setting up a meeting with a government employee, helping the constituent obtain unemployment compensation, helping the person resolve problems with the DMV, or calling VDOT after a snowstorm to inform it that the constituent's street is unplowed.

The Fourth Circuit's unprecedented broadening of the federal corruption laws is particularly concerning to Virginia's citizen legislators. Most hold full-time jobs,[4] and while working they may receive benefits, such as meals and token gifts. For example, a delegate who is also a construction contractor may attend an annual picnic hosted by one of his company's largest subcontractors. Sometime after the event, the subcontractor's CEO may reach out to the delegate about a completely unrelated legislative matter. Again, until Governor McDonnell's prosecution, no Virginian could have foreseen that federal authorities might assign criminal liability in such a case.

In some instances, the temporal link between a gift or benefit to a state legislator and a potential favorable act may be even more immediate and obvious. A bankers' association, for example, might invite a senator to attend a luncheon where it presents detailed

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[4] This arrangement is viewed as eminently desirable. "[T]hat the members [of the legislature] may be restrained from oppression, by feeling and participating the burthens of the people, they should, at fixed periods, be reduced to a private station [and] return into that body from which they were originally taken." Va. Const. Art. I, § 5.

accounts of legislation that the association favors and opposes. Or a major charity might host a delegate at a breakfast where it pointedly describes the charity's top legislative priorities for the upcoming legislative session. At both events, the legislator receives a benefit from a constituent at precisely the same time that the donor is seeking his or her legislative assistance. Under the traditional understanding of honest-services fraud, at neither event has a crime been committed. Yet, in the wake of the Fourth Circuit's ruling in *United States v. McDonnell*, federal law raises the specter of criminal prosecution in both instances.

As noted by one prominent legal scholar,

> Part of designing a political system is separating gifts from bribes—that is, defining what gifts ought to be categorized as corrupting. As Daniel Hays Lowenstein argued thirty years ago, a concept of corruption or bribery 'means identifying as immoral or criminal a subset of transactions and relationships within a set that, generally speaking, is fundamentally beneficial to mankind, both functionally and intrinsically'

Z. Teachout, *Corruption in America* 18 (2014) (quoting Daniel Hays Lowenstein, *For God, for Country, or for Me*, 74 Cal. L. Rev 1479, 1481 (1986)). The theory espoused in this case makes it impossible for legislators to distinguish between gift and bribe. In fact, under the Fourth Circuit's standard, what is "immoral or criminal" and what is "fundamentally beneficial to mankind" is a question left to the discretion of federal prosecutors.

This is a troubling result given the extraordinary power enjoyed by prosecutors, and the concomitant dangers of selective and arbitrary prosecutions. *See* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 197 (1985) ("Prosecutors in this country have enormous discretion, and their decisions are largely unconstrained by law."). As Justice Robert Jackson warned decades ago:

> If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies.

Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. of Crim. L. & Criminology 3, 5 (1941).

This Court should flatly reject the Fourth Circuit's expansive reading of the federal corruption laws and restore clear lines between lawful constituent interactions and schemes involving bribes or kickbacks.

III. THE FOURTH CIRCUIT'S RULING INFRINGES ON VIRGINIA'S CORE RIGHT OF SELF-GOVERNANCE.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Federalism is a fundamental structural means of securing core democratic values that guarantees "our fundamental liberties" and serves as a check on abuses of centralized federal power. *Id.* at 458. Hence, "[t]he powers delegated by the Constitution to the federal government are few and defined. Those which remain in the State governments are numerous and indefinite." THE FEDERALIST NO. 45, at 292 (James Madison) (C. Rossiter ed., 1961). These principles of federalism form the foundation of the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X; *see Printz v. United States*, 521 U.S. 898, 919 (1997).

As part of its powers, a state is entitled to establish rules governing the conduct and qualifications of its elected officials.

> Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign. It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers should be exclusive, and free from external interference, except so far as

> plainly provided by the Constitution of the United States.

Gregory, 501 U.S. at 457.

Federal interference with state governance upsets the delicate balance between federal and state power. Thus, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Id.* at 460; *accord Bond v. United States*, 134 S. Ct. 2077, 2089 (2014) ("Perhaps the clearest example of traditional state authority is the punishment of local criminal activity."). This Court explained, "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Put differently, but equivalently, "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States " *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65, (1989); *see also United States v. Craig*, 528 F.2d 773, 779 (7th Cir. 1976) ("[T]he primary responsibility for ferreting out [local] political corruption must rest, until Congress [properly] directs otherwise, with the State, the political unit most directly involved.").

Congress has not through the language of the federal corruption statutes made "clear and manifest" its intention to preempt Virginia's historic role in setting standards to govern the conduct of its most important public officials. This is in part why this Court has rejected overly broad constructions of the federal corruption laws that would improperly "involve[] the Federal Government in setting standards

of disclosure and good government for local and state officials." *McNally v. United States*, 483 U.S. 350, 360 (1987). Indeed, the Court has repeatedly employed this "clear and manifest" rule to limit the reach of any federal criminal statute that "would significantly change the federal-state balance." *Bond*, 134 S. Ct. at 2089–90 (internal quotation marks, alteration, and citation omitted); *see, e.g.*, *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (federal bank fraud statute); *Jones v. United States*, 529 U.S. 848, 858 (2000) (federal arson statute); *United States v. Bass*, 404 U.S. 336, 350 (1971) (Crime Control and Safe Streets Act).

The corruption statutes, as construed by this Court, make clear that they reach "core" bribery—that is, the exchange of "official acts" for payment. *Skilling*, 561 U.S. at 409. The statutes do not make it "unmistakably clear" that Congress intended to criminalize actions that form a core part of a legislator's job: asking staff to attend briefings with constituents, attending social gatherings attended by donors, helping constituents arrange meetings with government officials, and asking questions of government employees on behalf of benefactors and donors. *See Gregory*, 501 U.S. at 460.

It is critical to underscore that providing access for political supporters "embod[ies] a central feature of democracy—that constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Of course, both federal and state governments have a shared interest in guarding against corruption in the political process, otherwise "the voice of the

people may be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal." *United States v. Harriss*, 347 U.S. 612 (1954). But it is primarily the job of the state to set the boundaries between what is corruption and mere "[i]ngratiation and access." *See Citizens United*, 558 U.S. at 360.

Virginia has set these boundaries through a number of laws restricting the receipt of money or gifts, *see* Va. Code § 2.2-3103, -3103.1, and requiring full financial disclosure, *id.* §§ 2.2-3113 through -3118.1. These laws regulate the relationship between Virginia's elected officials and the people, and its authority to calibrate this relationship is at the center of "what gives [Virginia] its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). Congress can displace Virginia's judgment in this area only when it does so with absolute clarity. *See Gregory*, 501 U.S. at 460.

The federal corruption laws do not speak with the clarity necessary to redefine Virginia's relationship with its citizens. Nor do the corruption laws clearly establish a national code of ethics to regulate the conduct of Virginia's elected officials. The Fourth Circuit nevertheless expanded the corruption statutes to embrace Governor McDonnell's conduct even though there is no question that he did not violate Virginia law, as it existed during his tenure. This expansion of the federal corruption laws in the absence of explicit and clear Congressional intent is contrary to this Court's precedent and marks a significant incursion into Virginia's right of self-governance. This Court should restore the state-federal balance by reversing the Fourth Circuit and reiterating the narrow scope of

the federal corruption statutes. *See Skilling*, 561 U.S. at 409.

CONCLUSION

For the above reasons, this Court should reverse the judgment of the Fourth Circuit and vacate Governor McDonnell's conviction.

Respectfully submitted.

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March 7, 2016

APPENDIX

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List of Members and Former Members of the Virginia General Assembly 1a

LIST OF MEMBERS AND FORMER MEMBERS OF THE VIRGINIA GENERAL ASSEMBLY

Senate

Richard H. Black
Charles W. Carrico
A. Benton Chafin, Jr.
Amanda Chase
Charles J. Colgan (Former)
John A. Cosgrove, Jr.
William R. DeSteph
Siobhan Dunnavant
Thomas A. Garrett, Jr.
Emmett W Hanger
David W. Marsden
Stephen H. Martin (Former)
Ryan T. McDougle
Stephen D. Newman
Thomas K. Norment (Majority Leader)
Mark D. Obenshain
Bryce E. Reeves
Frank M. Ruff, Jr.
William M. Stanley, Jr.
Kenneth W Stolle (Former)
Walter A. Stosch (Former)
Richard H. Stuart
Glen H. Sturtevant
Scott A. Surovell
Frank W Wagner
John C. Watkins (Former)

House of Delegates

Leslie R. Adams
David B. Albo
Richard L. Anderson
Terry L. Austin
Ralph L. Axselle, Jr. (Former)
Richard P Bell
Robert S. Bloxom, Jr.
Jeffrey L. Campbell
Mark L. Cole
John A. Cox (Former)
M. Kirkland Cox (Majority Leader)
Glenn R. Davis
Thelma D. Drake (Former)
Leon Mark Dudenhefer
C. Matthew Farris
Hyland F Fowler, Jr.
T. Scott Garrett
C. Todd Gilbert (Deputy Majority Leader)
Thomas A. Greason
Christopher T. Head
Gordon C. Helsel, Jr.
M. Keith Hodges
Algie T. Howell, Jr. (Former)
William J. Howell (Speaker)
Timothy D. Hugo
Riley E. Ingram
William R. Janis (Former)
Johnny S. Joannou (Former)
Terry G. Kilgore
Barry D. Knight
R. Steven Landes
David A. LaRock
James A. Leftwich, Jr

L. Scott Lingamfelter
Daniel W Marshall, III
J. Randall Minchew
Jason S. Miyares
James W Morefield
Richard L. Morris
David A. Nutter (Former)
John M. O'Bannon
Robert D. Orrock, Sr.
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Charles D. Poindexter
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L. Nick Rush
Thomas D. Rust (Former)
Christopher B. Saxman (Former)
Edward T. Scott (Former)
Christopher P Stolle
Terrie L. Suit (Former)
Scott W Taylor
Ronald A. Villanueva
R. Lee Ware
Michael B. Watson (Former)
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Thomas C. Wright, Jr.
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